



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
HCCRC NO. 34 OF 2011

REPUBLIC.....PROSECUTOR

- V E R S U S -

EUTICUS MIMANO WAITHAKA.....ACCUSED

R U L I N G

During the testimony of P.W.2 he produced a receipt marked **PEXH.7** – and immediately after the said production – the defence counsel raised objection to the same. He argued that the authenticity of the receipt is in question as it does not bear any name, with regard to the source, the maker, and even the name of ‘Damaris’ the person alleged to have given it to P.W.2. He urged the court to expunge it from the record and order the prosecution to call its maker.

The prosecution’s response is that the objection is overtaken by events as the receipt has already been produced as exhibit for the prosecution. The prosecution relies on Section.33 (b) of the Evidence Act (Cap 80 Laws of Kenya). The prosecution also argues that the receipt is proof that the items alleged to have been bought by the person who bought them – and that no one would have thought it would be required as evidence.

I have considered the objections by counsel and the response by the prosecution.

First, section 33 of the Evidence Act – the heading is “Statement by deceased persons etc., when” – and then it states –

Statements, written or oral or electronically recorded of admissible facts made by a person who is dead, and who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose evidence cannot be procured, without an amount of delay or expense which is the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases;

(a)...

(b) made in the course of business

When the statement was made by such person in the ordinary course of business...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

S.33 places a burden on the prosecution to establish the facts surrounding the circumstances I have underlined in the quote. The prosecution did not need any evidence to show that Damaris is dead, or incapable of giving evidence or her attendance cannot be procured etc.

Clearly even as the prosecutor argues that the production of the receipt has been over taken by events – they themselves have not discharged their burden in complying with the clear provisions of S.33 of the Evidence Act.

In addition – the correct position is that, it is the burden of the prosecution to prove its case beyond a reasonable doubt even if the defence had not raised the objection what, would have been the value of the said receipt as evidence – without complying with the law on the production of documentary evidence?

Nothing stops the court either now or at a later stage from reviewing the said receipt, as a piece of evidence upon which the prosecution was relying on in its case against the accused person.

It is true that the receipt does not bear the name of Damaris, it does not bear the name of the maker, it bears no stamp – its origin – from the face of it is unknown – and the witness in the witness box cannot answer these questions hence as it is only proper that the production of the receipt as PEXH 7 be set aside – and the same remain as MFI 7 – and the prosecution be given the opportunity to avail the maker. It is so ordered.

T. MATHEKA

JUDGE

Ruling delivered this 14/3/2017 in open court in presence of Accused, Mr. A.Kariuki holding brief for Gichuki Mwangi for accused.

Ms. Chebet for State.

Court Assistant Harriet

T. MATHEKA

JUDGE

13/3/2017

Coram – T. Matheka, J

Court Asst. Harriet

Court Prosecutor – Ms. Jebet

Accused absent

Court – production order to issue

Ruling on 14/3/17

T. MATHEKA

JUDGE

14/3/17

Coram – T. Matheka, J

Court Asst. Harriet

Court Prosecutor – Chebet

A. Kariuki for Gichuki for accused

Court – I pray for time to avail the witness to produce the receipt.

T. MATHEKA

JUDGE

Hearing on 27/4/17 for prosecution to avail the witness to produced MFI-7.

T. MATHEKA

JUDGE